Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

DILLING MECHANICAL CONTRACTORS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 668, AFL-CIO and INDIANA STATE PIPE TRADES ASSOCIATION, UNITED ASSOCIATION OF PLUMBERS AND PIPEFITTERS, AFL-CIO,

Intervening Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a construction contractor, Dilling Mechanical Contractors, Inc., required to prove beyond a reasonable doubt that it unconditionally offered reinstatement to unfair labor practice strikers contrary to the requirements of 29 U.S.C. § 160(e).

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PETITION FOR WRIT OF CERTIORARI

Dilling Mechanical Contractors, Inc. respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 21, 1997 to resolve the conflict between the Seventh Circuit Court of Appeals decision and 29 U.S.C. § 160(e) on the issue of burden of proof as set forth below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is published at 107 F.3d 521 and was decided on February 21, 1997 with the Petition for Rehearing denied April 4, 1997. It is reprinted in Appendix "A", pgs. 1 through 8.

JURISDICTION

On February 21, 1997, the United States Court of Appeals for the Seventh Circuit denied Dilling's appeal of the National Labor Relations Board's September 18, 1995 Decision in which it adopted the Administrative Law Judge's recommended Order in this matter.

Dilling's subsequent Petition for Rehearing which it had filed on March 7, 1997, was denied by the Seventh Circuit on April 4, 1997.

Dilling is now seeking review on certiorari pursuant to United States Supreme Court Rule 10, contending that the 7th Circuit of the United States Court of Appeals has

rendered a decision in conflict with its prior decision in *NLRB v. Augusta Bakery Corp.* (1992), 7th Cir., 957 F.2d 1467, and the requirements of 29 U.S.C. § 160(e).

Pursuant to the United States Supreme Court Rule 13, "unless otherwise provided by law, a Petition for Writ of Certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States Court of Appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the clerk of this Court within 90 days after entry of the judgment."

The United States Supreme Court Rules 10 & 13 in conjunction with Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* confers on this Court's jurisdiction to review the Seventh Circuit's Order in this matter.

RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

1. 29 U.S.C. § 160(e).

> (e) Petition to court for enforcement of order; proceedings; review of judgment
>
> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary

relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its

> recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

STATEMENT OF THE CASE

Dilling is a construction contractor that was performing work on the Essex Wire Facility located in Franklin, Indiana more than fifty miles from Dilling's corporate office in Logansport, Indiana. Dilling had several employees performing electrical work on the Project, and these employees were supervised by Project Superintendent, Joel LaFleur, and an Assistant Superintendent, Roger Seely. The Essex Project began in late 1992 and finished in the summer of 1993. During the course of the Project, beginning in December 1992, the International Brotherhood of Electrical Workers ("IBEW") attempted to organize Dilling. In doing so, IBEW recruited some of Dilling's employees performing electrical work on the Project. In April 1993, some of the employees recruited objected to the manner and method that Dilling supervised them, and five of them initiated what they claimed to be an unfair labor practice strike, and a sixth, the Project Superintendent, Joel LaFleur, quit. (Record, pgs. 52 and 792).

The five employees, Robert Guinn, Gene Kaufman, Donna Serna, Michael Boatman, Sr., and Michael Boatman, Jr. initiated their strike on August 12, 1993. During the course of their strike the five employees carried picket signs and walked a picket line outside the Essex Wire facility. After engaging in their strike for eight days, on April 20, 1993, Bob Guinn, on behalf of the five striking employees informed the new Project Superintendent, Glen Click, and the Assistant Superintendent, Roger Seely, that he was wondering "if we were allowed to return to work." (Record, Page 266). He further stated, "we was ready to come back to work if you would take us back to work." (Record, Page 54). The Project Superintendent, Click, told Guinn and the strikers that they "needed to talk to Mr. Dilling" (Record, pgs. 54, 266, 422, 721) and that Mr. Dilling would give them "an assignment". (Record, Page 422). The five strikers did not report to work, did not contact Mr. Dilling, and did not seek or receive an assignment for work with Dilling. (Record, pgs. 266, 421, 422).

The striking employees were required to report back to Mr. Dilling, the president of Dilling Mechanical Contractors, Inc., because he was the sole person responsible for hiring, firing, and assigning work for employees. (Record, pgs. 762, 802-803). At the time that the five strikers discussed their status with Glen Click, at the Essex Project, Glen Click informed them that he did not have work available for them at the Essex facility because Dilling had engaged a subcontractor to perform the remaining electrical work. (Record, pgs. 662-663).

After being informed of the need to report to Mr. Dilling for an assignment, the five employees returned to

their picket line, began carrying picket signs, and continued to walk the picket line in front of the Essex facility from early in the morning on April 20, 1993 and for several months thereafter. (Record, pgs. 266, 399). The five strikers never reported to work at Dilling and never contacted Mr. Dilling for a work assignment. (Record, pgs. 808-809).

The strikers subsequently filed unfair labor practice charges against Dilling and the proceeding before the National Labor Relations Board was initiated. The Administrative Law Judge ruled in favor of the striking employees, ordering reinstatement. This decision was adopted in its entirety by the full Board. Subsequently, Dilling Mechanical Contractors, Inc. appealed this decision to the seventh Circuit Court of Appeals which affirmed the Board's decision. Dilling's Petition for Rehearing was denied, and this Petition ensued.

REASONS FOR GRANTING THE WRIT

The decision of the Seventh Circuit Court of Appeals violates the standard of proof required under 29 U.S.C. § 160(e).

An employer is only required to prove its offer of reinstatement to striking employees based upon substantial evidence. This threshold is greater than a mere preponderance of the evidence, but is less than proving beyond a reasonable doubt. As importantly, the Court must apply the same standard to the employer's burden of proving its offer of reinstatement as it does to the employees' burden of proving their unconditional offer of

returning to work. In this case the same burden of proof was not applied equally to both parties.

In this case, the employer was required to prove its offer of reinstatement beyond a reasonable doubt, contrary to the dictates of statute and precedent. *NLRB v. Augusta Bakery Corp.* (7th Cir. 1992),957 F.2d 1467; 29 U.S.C. § 160(e).

The Seventh Circuit Court of Appeals in its initial Opinion rendered in this case reviewed both the employees' unconditional offer to return to work and the employer's offer of reinstatement. In reviewing the unconditional offer to return to work the Court concluded that the striking employees proved by substantial evidence that they did indeed make an unconditional offer to return to work. In doing so, the Court established parameters for proof based upon substantial evidence. The Court concluded that the burden of proving the offer to return to work by substantial evidence was carried when the strikers made a vague offer to return to work, issued letters in apparent conflict with their actions, and acted contrary to their expressed intent of offering to return to work unconditionally.

In particular, the offer to return to work was stated as an inquiry by Mr. Guinn wondering if "we were allowed to return to work" and that they were "ready to come back to work [if Dilling] would take them back to work." (Record, p. 54). The strikers then went back on the picket line and did not report to the office for an assignment of work. Clearly an action contrary to the expressed intent of offering to return to work unconditionally. Subsequently, the strikers then sent a letter to Dilling indicating

that they had returned to work, even though they had not, and requesting the employer to contact not Guinn, the spokesman who offered to return to work initially, but a third party, Ed Butler, who was not an employee at all.

Nonetheless, both the Board and the Seventh Circuit Court of Appeals concluded that the evidence constituted substantial evidence to support the employees' burden of proof. Not only was it sufficient to prove their case, it was sufficient to insulate their evidence from collateral attack by the employer. The Court concluded that "there is substantial evidence to support the Board's conclusion that Guinn's statement to supervisor, Click, at the Essex Wire Jobsite – that they were 'ready to come back to work' – was sufficient to notify Dilling that the strikers were making an unconditional offer to return to work. Substantial evidence also exists to support the Board's finding that the April 20, 1993 fax sent to Dilling served as further notice that the strikers sought a return to work unconditionally." (Opinion, pgs. 6 and 7). By so stating, the Seventh Circuit Court of Appeals established the standard to be used to determine whether or not substantial evidence has been presented to the Board or to the Court.

Based upon the Court's standard of substantial evidence needed to carry a party's burden of proof, Dilling also proved by substantial evidence that it offered reinstatement to the striking employees. It is undisputed that the striking employees were offered reinstatement. The striking employees were told by Glen Click to report to Dick Dilling, the owner of the company, for a work

assignment. (Record, pgs. 54, 266, 422, 721). This statement, made to the striking employees at the same time that they made their offer to return to work, was not misunderstood. Donna Serna, one of the strikers, confirmed that the strikers were "given the instruction down at the Essex project that you were to set up an appointment with Dick if you wanted your job back" and Serna took no action on that, even though (she) was right outside the office. (Record, p. 422).

Using the same standard of what constitutes substantial evidence, and applying it to the facts in support of Dilling's proof, it reveals that Dilling made an offer, no less ambiguous or disjointed than the offer to return to work made by Guinn on behalf of the employees. This offer was not misunderstood by the strikers, but in fact was fully understood, as confirmed by Serna's testimony. The strikers fully understood that Dilling had offered them reinstatement in the same manner that the strikers had offered to return to work. Neither the strikers nor the employer used all of the technically correct words in their statements, but the recipients of the statements fully understood the extent and meaning of the statements made.

Similarly, Dilling, after making the offer of reinstatement acted consistent with the timely offer of reinstatement. That is, the owner of the company made himself available, all day, to talk to the returning strikers and assign them to work. Such an action was consistent with the offer to return to work, unlike the strikers who acted inconsistently with their offer by returning to the picket line. Nonetheless, the strikers were deemed to have carried their burden of proof through substantial evidence.

Although both the Board and the Court place some emphasis on correspondence which occurred after the time of the offers made between the parties, such evidence merely confirms each party's understanding of their actions. For example, the union's letters sent almost four months after their offer to return to work, merely confirmed that they had made such an offer. Similarly, the employer's response to that letter merely confirmed that the employer had offered them reinstatement and they had refused. The weight of either letter should be minimal, since it is each party's understanding at the time that the offers were made which should govern a decision in this case.

Dilling established through substantial evidence, as substantial evidence was defined by this Court, in this case, that it made an offer to reinstate the employees, that that offer was fully understood by the employees, and that the employees failed to avail themselves of the opportunity presented in that offer, and thereby rejected the offer of reinstatement. Dilling carried its burden of proof through the testimony of both strikers and Dilling employees who testified to the exact words that were spoken and, more importantly, to how those words were understood by all parties involved. It is imperative that the actual understanding of the parties involved be used by this Court and not the possible understandings of the parties.

If Dilling were to prove that it was more likely than not that it offered to return the strikers to work, then such a proof would be proof by a mere preponderance of the

evidence. If Dilling were to prove that it offered reinstatement through a bundle of evidence which clearly outweighs any evidence to the contrary, then Dilling has established its proof by substantial evidence. If, however, Dilling is required to carry its burden of proof by establishing that all possible facts and inferences can only be drawn in its favor and in support of its offer of reinstatement, then Dilling will have been required to prove its case beyond a reasonable doubt. By the Seventh Circuit Court of Appeals applying a different standard of proving Dilling's offer of reinstatement than it does to the union's offer to return to work, the Court necessarily forces Dilling to carry a burden greater than the striking employees are required to carry, and necessarily requires Dilling to prove its case beyond a reasonable doubt.

This higher standard of proof is evidenced by the conclusions drawn by the Court, and the comparison made by the Court between the offers of the two parties. The Seventh Circuit Court of Appeals concluded that a vague statement made by Bob Guinn wondering if they were able to come back to work and wondering about their status constituted an unconditional offer to return to work, while concluding that a vague statement, as determined by the Court, that the striking employees were "to set up an appointment with Dick Dilling if they wanted their job back", despite the strikers' full understanding of what that meant, did not constitute an offer of reinstatement. The Court is employing an arbitrary double standard for proof.

Similarly, the Seventh Circuit Court of Appeals emphasized what inferences could be drawn from the parties' actions, and how the parties acted after the offers

were made to determine their validity. Again, the Court concluded that the union's actions of returning to the picket line was consistent with their offer to return to work, while Dilling's actions of making the owner available to meet with the "returning" strikers was inconsistent with an offer of reinstatement. The union's actions contrary to its offer are dismissed as permissible actions on behalf of the union. The actions by Dilling are merely deemed incredulous, despite his statements being unrefuted and undisputed by anyone.

Finally, the Seventh Circuit Court of Appeals infers that the union acted properly based upon correspondence they sent to the employer almost four months after their return to work. Correspondence which clearly sets forth that they had intended to make an unconditional offer at that time. The Court then infers that Dilling did not intend to offer reinstatement to its employees based upon the employer's response to the union's letter which states clearly that the employer had offered them reinstatement and the employees had rejected it. The language in the two subsequent letters was clear and not subject to misinterpretation. Nonetheless, the Court interprets the union's letter consistent with the plain and ordinary meaning of the words contained within the letter, but rejects the employer's clear and unambiguous language as being secondary or unintended.

These three comparisons demonstrate that the Court is not requiring the employer to establish its proof pursuant to the same standard that the striking employees were required to establish their proof, but that the employer has a greater burden. A burden of establishing that there can be no facts, no inferences, no reasonable

doubt as to contrary conclusions which can be drawn from their evidence. Consequently, the employer is being required to prove its case beyond a reasonable doubt contrary to both the dictates of statute and precedent.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL L. EINTERZ, #11717-49

APPENDIX

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Appeal to the United States Court of Appeals for the 7th Circuit denied; NLRB Decision enforced 107 F.3d 521 7th Cir. 1997; rehearing denied April 4, 1997 ..... App. 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 95-3407 and 95-3641

DILLING MECHANICAL CONTRACTORS, INC.,

Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner.

Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board.
Nos. 25-CA-22501, 25-CA-22549, 25-CA-23157, 25-CA-23386

ARGUED SEPTEMBER 4, 1996 – DECIDED FEBRUARY 21, 1997

Before CUMMINGS, COFFEY, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* Dilling Mechanical Contractors, Inc. ("Dilling") petitions this court for a review of the National Labor Relations Board's ("the Board") finding that Dilling violated 29 U.S.C. § 158(a)(1) and (a)(3). The Board determined that Dilling committed § 8(a)(1) and (a)(3) violations by failing to reinstate unfair labor practice strikers after they had made an unconditional offer to return to work. Dilling appeals the Board's order. In turn,

the Board cross-petitions for enforcement of its order. We deny Dilling's appeal and enforce the Board's order.

I. History

Dilling is an industrial contractor that employs about 100 people and has its main office in Logansport, Indiana. The bulk of Dilling's business is divided between electrical contract work and mechanical work – which includes all of Dilling's other construction trades.

Beginning in 1992, the International Brotherhood of Electrical Workers Union ("IBEW") was successful in organizing many of Dilling's electrical contract workers. In the later part of 1992, Dilling performed work on the Essex Wire facility, located in Franklin, Indiana, more than 50 miles from Dilling's main office in Logansport. After the work at Essex Wire began, Dilling transferred virtually all IBEW supporters to that job site. Dilling then employed Roger Seely, an ex-Navy Seal with no electrical work experience, to serve as the Essex Wire job site "expeditor." As the expeditor, Seely's duties included the enforcement of company rules and insuring that the workers performed their duties in a manner that was satisfactory to Dilling's management. In short, the record readily demonstrates that Dilling brought in Seely to intimidate and berate employees who supported the IBEW.

In response to Dilling's heavy-handed tactics, on April 12, 1993, five of Dilling's employees, all of whom were members of the IBEW, ceased work in a concerted effort at the Essex Wire job site and engaged in an unfair labor practice strike. Those employees were: Robert

Guinn, Gene Kaufman, Donna Serna, Michael Boatman, Sr. and Michael Boatman, Jr. After approximately one week of picketing, however, the strikers collectively decided to return to work. On April 20, 1993, three of the strikers – Guinn, Serna and Kaufman – went to speak with Dilling's supervisor at the Essex Wire job site to inquire about returning to work. When Guinn asked if all the strikers could return to work, the job site supervisor, Glenn Click, told Guinn and the others that they would have to speak with company president, Dick Dilling, because as far as the company was concerned, the strikers were "considered to have quit." Following Click's response, the strikers resumed picketing outside the Essex Wire job site. Additionally, the strikers began picketing at Dilling's headquarters in Logansport.

On the same day that Guinn spoke with supervisor Click, the union, on behalf of the strikers, faxed a letter to Dick Dilling at the company's headquarters making an unconditional offer to return to work. Dilling did not respond. Although Dilling's management was aware that the strikers were picketing outside their headquarters, nothing was said to the strikers about returning to work.

Three months later, on July 27, 1993, the strikers, through the IBEW, sent a second letter to Dilling, reaffirming their unconditional offer to return to work. Dilling did respond to this letter on August 4, 1993, indicating that the company had no record of the strikers' previous unconditional offer to return to work. Furthermore, Dilling's response stated that the strikers had been given, but subsequently refused, an opportunity to return to work for Dilling.

The workers sent yet another letter to Dilling on April 20, 1994, asking again for reinstatement to their old jobs. Dilling did not respond and the IBEW eventually filed unfair labor practice charges against Dilling for failing to reinstate the strikers. After extensive hearings, the ALJ determined that Dilling's refusal to reinstate the strikers violated § 8(a)(1)[1] and (a)(3)[2] of the National Labor Relations Act. In turn, the Board adopted the ALJ's recommended order.

II. Standard of Review

We will uphold the Board's order if "substantial evidence on the record as a whole supports its factual findings and if its conclusions have a reasonable basis in the law." *Carry Cos. of Illinois v. NLRB*, 30 F.3d 922, 926 (7th Cir. 1994) (citing *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 716 (7th Cir. 1992)); *see also* 29 U.S.C. § 160(e), (f). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305

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[1] Section 8(a)(1) prohibits an employer from interfering with the rights guaranteed in § 7 of the Act. 29 U.S.C. § 158(a)(1).

Section 7 provides, in part, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations . . . [and] to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

[2] Section 8(a)(3) forbids an employer from "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

U.S. 197, 229 (1938)). While it is not our job to engage in fact finding or to replace the Board's reasonable conclusions, a mere cursory review of the record is insufficient. Instead, we must take into account the entire record – which would include any evidence contrary to the Board's view. *See Chicago Tribune*, 962 F.2d at 716. Nonetheless, "an ALJ's credibility determinations are entitled to considerable deference and will be overturned by a reviewing court only when extraordinary circumstances so require." *Carry Cos.*, 30 F.3d at 926; *accord NLRB v. Advance Transport Co.*, 979 F.2d 569, 573 (7th Cir. 1992).

III. Analysis

We begin with the well-settled principle that "unfair labor practice strikers are entitled to reinstatement upon making an unconditional offer to return to work." *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1188 (7th Cir. 1990); *accord Richmond Recording Corp. v. NLRB*, 836 F.2d 289, 292 (7th Cir. 1989). Accordingly, an employer violates § 8(a)(1) and (a)(3) of the Act when he fails to offer immediate reinstatement to unfair labor practice strikers who have made an unconditional offer to return to work. *Richmond Recording Corp.*, 836 F.2d at 293-94.

Dilling vigorously disputes the Board's determination that it committed § 8(a)(1) and (a)(3) violations by failing to reinstate the strikers after they had offered to return to work unconditionally. Dilling's argument is premised upon two assertions: a) the strikers did not make an unconditional offer to return to work; and b) the

company president, Dick Dilling, attempted to reinstate the strikers but they refused.

A. The Unconditional Offer to Return to Work

Dilling contends that there was no substantial evidence for the Board to determine that the strikers made an unconditional offer to return to work. In fact, it is Dilling's position that no such offer was made by the strikers and thus, Dilling had no duty to reinstate them. In this regard, however, we have held that the employer bears the burden to demonstrate that the offer to return to work was not unconditional. *See NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1472 (7th Cir. 1992). Furthermore, "[t]he Board's finding of an unconditional offer is a predominantly factual determination, which we must uphold if supported by substantial evidence." *Id.*

Notwithstanding Dilling's assertion, our review of the record reveals that the strikers did indeed make an unconditional offer to return to work. At approximately 7:00 a.m. on April 20, 1993, Bob Guinn, accompanied by Gene Kaufman and Donna Serna, drove to the Essex Wire job site. Guinn recounted that upon their arrival he told the supervisor, Glen Click, that "we was ready to come back to work if [Click] would take us back." Guinn's recollection is substantiated by the testimony of strikers Kaufman and Serna – both of whom were present during the conversation.

Instead of reinstating the strikers, however, supervisor Click told Guinn and his fellow strikers that they

"had been replaced" and that the company had "considered the strikers to have quit." Following Click's comments, the record indicates that Guinn and the other strikers resumed picketing. Shortly after Guinn and his fellow strikers resumed their picketing, the IBEW faxed Dilling the following letter:

> This letter is to notify you that as of 7:00 A.M., 20 April 1993 the Organizing Committee has unconditionally called off their Unfair Labor Practice Strike against Dilling Mech./Elec. Contractors and returned to work. They have reported to the Essex Wire job site of which they were last assigned and are ready to go back to work.
>
> If you have any questions, please contact Ed Butler with I.B.E.W. Local 668 at 317-474-1021.

Additionally, the record discloses that over the course of the next year, the IBEW made at least two more attempts to notify Dilling that its members would return to work unconditionally. Letters were sent to Dilling on July 27, 1993[3] and on April 20, 1994[4] specifically reaffirming the strikers' original offer.

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[3] The strikers' July 27, 1993 letter, in part, reads as follows:

> . . . We wish to remind you that the following employees of Dilling Mechanical/Electrical did issue you an unconditional return to work, following their strike and still wish to return to work for your company. . . .

[4] The strikers' August 20, 1994 letter reads as follows:

> This letter is to restate and to remind you that on April 20, 1993 and several occasions since then, the organizing committee of IBEW Local 668 made an unconditional offer to return to work on behalf of the Unfair Labor Practice Strikers.

Based on the foregoing, there is substantial evidence to support the Board's conclusion that Guinn's statement to supervisor Click at the Essex Wire job site – that they were "ready to come back to work" – was sufficient to notify Dilling that the strikers were making an unconditional offer to return to work. Substantial evidence also exists to support the Board's finding that the April 20, 1993 fax sent to Dilling served as further notice that the strikers sought to return to work unconditionally. *See generally Lapham-Hickey Steel Corp.*, 904 F.2d at 1180.

Not only did the Board have before it Guinn's oral offer on behalf of the strikers to return to work unconditionally, but it also had the April 20 letter, as well as the two subsequent letters sent by the IBEW on behalf of the strikers. These facts are certainly adequate to support the Board's conclusion that the strikers notified Dilling of their unconditional offer to return to work.

Finally, Dilling contends that there was no actual unconditional offer to return to work because the strikers resumed picketing immediately following Guinn's conversation with Click on April 20, 1993. Dilling's position is simply without merit. The resumption or the continuance of a union's picket line is not inconsistent with the

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As we have stated before, the ULP Strikers are willing to discontinue their strike and return to work. If you do not have a means to contact any of the strikers, you can get in touch with them by calling Ed Butler at 317-474-1021, Monday thru Friday from 8:00 a.m. until 5:00 p.m.

If you have any questions regarding this matter, please do not hesitate to contact Ed Butler.

union's unconditional offer to return to work. *Harris-Teeter Super Markets, Inc.*, 242 NLRB 132, 101 LRRM (BNA) 1130, *available in* 1979 WL 9061, at *40 (1979), *enforced, sub nom. NLRB v. Harris-Teeter Super Markets, Inc.*, 644 F.2d 39 (D.C. Cir. 1981).

B. The Employer's Offer for Reinstatement

Dilling presents the additional argument that it made a valid offer to reinstate the strikers, even though it claims that the strikers failed to make an unconditional offer to return to work. Dilling supports its assertion on the following premise: on April 20, 1993, while at the Essex Wire job site, supervisor Click told Guinn that the striking employees were considered to have quit their jobs and that they should "set up an appointment with Dick Dilling if they wanted their jobs back"; and Dilling offered the testimony of president Dick Dilling – stating that he made himself available for striker reinstatement appointments beginning April 20, 1993 and that no striker called him asking for reinstatement. Therefore, Dilling asserts that the strikers' unwillingness to contact Dick Dilling amounted to a "refus[al] to avail themselves of the opportunity" of reinstatement.

The Board had before it the following evidence on the issue of an offer of reinstatement. First, supervisor Click's statement to Guinn was, at best, ambiguous. Telling the strikers that they had quit and had been replaced was merely a rebuff of the strikers' return to work offer. Second, Dilling gave no meaningful response to the IBEW's letters of April 20, 1993, July 27, 1993, and April 20, 1994 – all of which requested that Dilling contact the

union regarding reinstatement of the strikers. In its single reply (made to the IBEW's July 27, 1993 letter), Dilling sidestepped the strikers' unmistakably clear offer to return to work unconditionally. The union's letters, written on behalf of the strikers, were of no avail. It is obvious, as the Board found, that Dilling's response to the union was spurious. Third, neither Dilling's president nor anyone on behalf of the company made any attempt to contact the strikers about reinstatement, despite the fact that Dilling's management was aware that the strikers were picketing outside Dilling's headquarters.

Accordingly, it is abundantly clear from the record that substantial evidence demonstrates that the Board correctly concluded that Dilling did not make an offer of reinstatement.

IV. Conclusion

For the reasons stated above, we Deny Dilling's petition and Enforce the Board's order.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit